

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 785 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

KACHRAJI VEGAJI

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

MS.K.N.Valikarimwala, A.P.P. for Respondents

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 28/07/97

ORAL JUDGEMENT

Rule. Service of Rule waived by Ms. K. N. Valikarimwala, learned A.P.P. for the respondents.

2. Heard. The petitioner stood convicted and sentenced for life as per the Judgment and order dated 2nd September 1987 rendered by the learned Sessions Judge at Mehsana. He was convicted for the offence punishable

under Section 302 I.P.Code. His Appeal before this Court came to be dismissed and he has been in Jail for more than 11 years bearing in mind his confinement as an under-trial prisoner. It appears that his 6th furlough falling due on or around 7th September 1996 came to be forfeited on account of the prisoner having surrendered late by five days. That is how his Application for furlough was rejected by the concerned Jail Authority of the respondent. The prisoner has moved this petition challenging the aforesaid order and praying for his release on his due furlough.

3. On behalf of the respondent reference has been made to a decision of this Court rendered on 23rd February 1987 in Special Criminal Application No.328 of 1986. The Division Bench of this Court (Coram : M.B.Shah & P.M.Chauhan, JJ., as Their Lordships then were, Per M.B.Shah, J.) observed as under after referring to Rule : 4(6) of the Prison (Bombay Furlough and Parole) Rules, 1959 :

"This rule was interpreted by a Division Bench of this Court (M.P.Thakkar and R.C.Mankad, JJ.) in Special Criminal Application Nos. 496 and 527 of 1981, decided on 5.11.1982. While considering this rule, the Division Bench observed that if the prisoners are refused furlough on account of their own act or misconduct, they obviously can not claim any right to be released on furlough."

In the facts of the case before the Division Bench Rule was discharged.

4. On behalf of the petitioner reference has been made to a Full Bench decision of this Court in the case of Bhikhabhai Devshi V/s. State of Gujarat & ors., reported in XXVIII (2) - 1987(2) G.L.R. 1178. Considering the relevant provisions of the Prisons Act, 1894 as amended by Bombay (Prisons Amendment) Act, 1953 and the relevant rules of the Bombay Jail Manual it has been observed by the Full Bench that the furlough and parole serve different purposes, that furlough is a matter of right whereas parole is not so, that furlough is to be granted periodically under Rule 3 irrespective of any particular reason merely with a view to enable the prisoner to have family and social ties and to avoid ill effects of continuous prison life, and the period of furlough is treated as remission of sentence. Since furlough is to be granted for no particular reason, it can be denied in the interest of the Society and that the prisoners have a privilege admissible to them under the

furlough system as mentioned in Rule 2(17) of the Furlough Rules. It has been further observed that even if furlough is not an absolute right of the prisoner, nonetheless it is a right and privilege admissible and regulated under the rules and it can be granted, refused or withdrawn as per rules. On consideration of Rule 4(10) of the Prison (Bombay Furlough and Parole) Rules, 1959, the Full Bench observed that the word "shall" is required to be read as "may" and that as far as the first part of Rule 4(10) is concerned, in respect of prisoners who have escaped or attempted to escape, such prisoners, a class by themselves, cannot be trusted for being released on furlough and, therefore, in such cases, the prison authority would be justified in not considering their request for furlough. In respect of the second part of the rule it has been observed as under :

"However, in cases of late surrender, where there is no element of escape, but merely there is a delay in surrendering, the question will have to be examined on the facts and circumstances and merits of each case."

5. Thus in the context of latter part of Rule 4(10) of the aforesaid rules the word "shall" will have to be read as "may" and the said part of the rule is held to be directory. Accordingly it has been held that the Prison Authorities can not reject as ineligible the request of due furlough of the prisoners who have surrendered late in past. The authorities have the power and duty to consider grant or refusal of such furlough due to the prisoners, having regard to the facts and circumstances of the case including the fact that the prisoner had surrendered late in past. That would be one of the relevant factors to be taken into account. Another relevant factor to be taken into account will be the view taken regarding the gravity of the offence while imposing punishment under Section 48A of the Prisons Act read with Rule 1287 of the Jail Manual. The Full Bench held as under in the case before it :

"In the present case, since the request of the prisoner for due furlough was refused by the jail authorities only on the technical misconceived legal bar of Rule 4(10), the refusal of furlough is clearly illegal and is required to be quashed and set aside and the authorities are required to consider the said request for furlough/furloughs due to the prisoner in accordance with law and in the light of observations made to this judgment."

6. In the present case it has been submitted by the learned Advocate for the petitioner that the petitioner surrendered late by five days on account of his own sickness. Bearing in mind the facts of the case, following order is passed :

The order of forfeiture of sixth furlough passed by the concerned Jail Authority of the respondents is hereby set aside. However, the Jail Authority will reconsider the question of late surrender of petitioner after considering the reason of his own sickness which is sought to be canvassed by the petitioner and pass appropriate order with regard to his sixth due furlough in accordance with law. Rule made absolute only in the aforesaid terms.

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